Filed 10/21/14 In re Jonathan E. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JONATHAN E., JR., A Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JONATHAN E., Defendant and Appellant.	B254645 (Los Angeles County Super. Ct. No. DK00422)

APPEAL from orders of the Superior Court of Los Angeles County, Carlos E. Vazquez, Judge. Affirmed.

Cameryn Schmidt, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Office of the County Counsel, Dawyn R. Harrison, Assistant County Counsel and Denise M. Hippach, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Jonathan E. (Father) appeals the court's order finding his son subject to jurisdiction under Welfare and Institutions Code section 300, subdivision (f) due to the death of Father's infant daughter, which occurred as the result of co-sleeping or bed sharing.[1] He further contends the court erred in requiring his visits with his son to be monitored after termination of jurisdiction. We conclude substantial evidence supports the court's jurisdictional finding and that Father forfeited objection to the dispositional order. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Father is the father of Jonathan E., Jr. (Jon), born in October 2006.[2] On September 11, 2012, Jon's infant half-sibling "Jo" died while in Father's care.[3] Jo, who was only two months old at the time, died under circumstances that suggested asphyxiation. Father reported that he had fallen asleep with Jo next to him, and woke up 15 minutes later to find her unresponsive. He denied rolling onto her.[4] He called 911 and attempted CPR. Paramedics arrived and continued to perform CPR until she was pronounced dead.

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1 Undesignated statutory provisions are to the Welfare and Institutions Code.

2 Christina A. (Mother) is Jon's mother. She is not a party to this appeal.

3 Jo's mother was Maryann A. Maryann is sometimes referred to as Father's wife and other times as his girlfriend. Her name is sometimes spelled "Maryanne" or "Mary Ann."

4 This information was provided to medical workers. Subsequent to this interview, Father retained an attorney and refused to be interviewed further on advice of counsel. Accordingly, he was never interviewed by the Department of Children and Family Services (DCFS) or law enforcement personnel. Father had told Maryann that when he fell asleep, he was holding the baby while resting against a lounge pillow with armrests he had bought to help Maryann breast feed. Either Father or Maryann had reported to medical workers that it was "routine" for Father to nap with the baby.

Father, Maryann, and Maryann's 20-year-old daughter lived in the home at the time. Father was a registered nurse and Maryann was studying to become a vocational nurse. Jo had never been in daycare and there had been no visitors in the home during her brief life. Jo had been born prematurely, weighing 5.7 pounds, and the hospital had advised the parents to have her sleep on her side or back. Maryann reported that Jo did not like her bassinet and was generally placed on her side in a bounce chair to sleep. On the night of the baby's death, Maryann had gone to her evening classes, leaving Father home alone with Jo. Father had just come home from working a long shift.

An investigation was commenced by the DCFS, which initially determined the death was accidental. However, the investigation was re-opened in March 2013, when the coroner's final autopsy report was issued, stating that the cause of Jo's death was "highly suspicious for imposed suffocation." The autopsy report noted the presence of petachiae (minor hemorrhages or broken blood vessels) of the eyes, gums, thymus gland and visceral pleura (lining of the lungs), which were indicative of death from "positional asphyxia or smothering." It also stated that Jo suffered from "numerous bilateral anterior and posterior rib fractures of an undetermined age" -- estimated to be between two to four weeks old -- and that posterior rib fractures were "rarely reported in resuscitative interventions," but were "more commonly associated with physical abuse."

After DCFS re-opened its investigation, Mother was interviewed and reported that Jon had continued to visit Father and Maryann, on the weekends. He enjoyed the visits and had reported no abuse. Mother stated that when she and Father had been together, she had observed no abuse of Jon and had not been the

subject of abuse herself.[5] Jon was interviewed and reported no physical abuse of either himself or Jo. He stated he enjoyed visiting Father and Maryann and was not afraid of either of them. Father refused to be interviewed.

Mother initially agreed to seek a monitored visitation order in family court, but subsequently decided to abandon that effort, as she perceived no safety concerns. In August 2013, DCFS filed a petition and applied for a removal order to remove Jon from Father.[6] The court issued the removal order and appointed an expert, Carol Berkowitz, M.D., to evaluate the medical records and coroner's report, and to render her medical opinion as to whether Jo was physically abused and whether her death was accidental.

The caseworker's jurisdiction/disposition report contained little additional information. Jon was re-interviewed and continued to report no abuse. Father continued to refuse to be interviewed on advice of counsel. Mother stated she

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[5] Mother did, however, report that Father had a history of depression and had had suicidal thoughts in 2010, causing him to be placed on a 72-hour hold.

[6] The petition contained the following factual allegations: (1) "[Jo] was determined upon autopsy to be suffering from a detrimental and endangering condition consisting of healing fracture[s] of [multiple] ribs, . . . and petachiae of the . . . eyes, lungs and gums"'; (2) Jo's death was "highly suspicious for imposed suffocation"; (3) Jo's injuries "would not ordinarily occur except as the result of deliberate, unreasonable and neglectful acts by [Father] and [Maryann]"; (4) Father "gave no explanation of the manner in which [Jo] sustained the . . . injuries," which were "consistent with inflicted trauma"; (5) Father "knew or reasonably should have known [Jo] was being physically abused and failed to protect the sibling"; (6) Father "failed to obtain timely necessary medical treatment for [Jo's] injuries"; and (7) Father placed Jo in "a detrimental and endangering situation" by co-sleeping with her. The petition further alleged that the described actions "endanger[ed] [Jon's] physical health, safety and well-being, placing [him] at risk of physical harm, damage and danger." It also alleged that the factual allegations supported jurisdiction under subdivision (a) (serious physical harm), subdivision (b) (failure to protect), subdivision (f) (caused another child's death through abuse or neglect), and subdivision (j) (abuse of sibling).

would comply with all court orders whether she believed the allegations of the petition or not.

Prior to the jurisdictional hearing, Dr. Berkowitz prepared a report stating that the rib fractures, a total of 18, showed evidence of healing under x-ray and microscopic examination and appeared to be two to four weeks old. Thus, they had not occurred during Jo's birth and appeared unrelated to her death. According to Dr. Berkowitz, the findings of petechiae in the eyes, gums, thymus and visceral pleura were "consistent with positional asphyxia/smothering, also referred to as accidental suffocation." According to the report, the death was "related to bed-sharing," which Dr. Berkowitz described as an "unsafe sleep situation." Dr. Berkowitz said there was "no medical evidence of physical abuse at the time of death" and that "[t]he mode of death . . . was undetermined."[7]

At the February 2014 jurisdictional hearing Dr. Berkowitz reiterated that the cause of Jo's death was asphyxia or suffocation secondary to bed-sharing, which she continued to describe as an "unsafe sleeping situation." She defined unsafe sleeping situation as placing the baby "in an environment in which [he or she] may suffocate" or suffer "sudden unexpected infant death" caused by another person rolling over onto the baby or the baby getting wedged between another person and pillows or cushions. She reiterated that the rib fractures were not birth-related. She opined they were caused by someone squeezing the baby's chest with a good deal of force.[8]

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[7] At the jurisdictional hearing, Dr. Berkowitz explained that "mode" or "manner" of death referred to whether it was homicide, suicide, natural, accidental, or undetermined.

[8] Questioned by Jon's counsel, Dr. Berkowitz testified that she did not consider bed-sharing to be "abuse," and could not "necessarily" characterize it as "neglectful." During closing argument, counsel for Jon contended that insufficient evidence supported the subdivision (f) allegation. Mother joined Father in asking that all counts be dismissed.

The court dismissed the subdivision (a), (b) and (j) of section 300 allegations and made the following findings: (1) "[Jo] was determined upon autopsy to be suffering from a detrimental and endangering condition consisting of healing fractures of the right posterior eighth and ninth ribs, healing fractures of the anterior right fourth, fifth, sixth, seventh and eighth ribs, healing fracture of [the] left posterior tenth rib, healing fractures of the left anterior lateral third, fourth and fifth ribs, healing fractures of the left anterior third, fourth, sixth, seventh, eighth and ninth ribs, and petechiae of [her] eyes, lungs and gums. [Father] gave no explanation of the manner in which [Jo] sustained [her] injuries. [Jo's] injuries are consistent with inflicted trauma. [Jo] died on 9/11/12. [Jo's] death was due to asphyxiation. Such injuries would not ordinarily occur except as the result of deliberate, unreasonable and neglectful acts by [Father] and [Maryann] who had care, custody and control of the sibling"; (2) [Father] placed [Jo] . . . in a detrimental and endangering situation, in that [Father] caused [Jo] to co[-]sleep with [Father]. [Jo] was found dead following co[-]sleeping with [Father]. [Jo] sustained petechiae of [her] eyes, lungs and gums. [Jo's] death was due to asphyxiation." The court found that these allegations supported assertion of jurisdiction over Jon under section 300, subdivision (f) only.

In making its jurisdictional findings, the court deleted the allegation that the described actions "endanger[ed] [Jon's] physical health, safety and well-being, placing [Jon] at risk of physical harm, damage and danger." The court observed that subdivision (f), unlike the other subdivisions of section 300, did not require a showing of present risk of harm to the child named in the petition, and that the evidence before it did not include any report of abuse of Jon by Father or Maryann.

Turning to disposition, the court asked counsel for argument. Counsel for DCFS requested that the case be closed with a family law order giving Mother sole

physical and legal custody.[9] Father's counsel joined in that request. The court asked whether counsel wished to be heard regarding the terms of the family law order. Father's counsel asked for joint legal custody. She also pointed out that Father currently had monitored visits and asked that such visits be "as often as can be arranged." The court granted joint legal custody to both parents and sole physical custody to Mother. It ruled that Father was to have monitored visits as often as could be arranged, and terminated jurisdiction. The family law order issued February 11, 2014. It specified monitored visitation for Father. Father appealed.

DISCUSSION

A. *Jurisdiction*

In order to assert jurisdiction over a minor, the juvenile court must find that he or she falls within one or more of the categories specified in section 300. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) DCFS bears the burden of proving by a preponderance of the evidence that the minor comes under the juvenile court's jurisdiction. (*Ibid.*) "We review the juvenile court's jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court's orders, if possible. [Citation.]" (*In re David M.*

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[9] Custody and visitation orders issued when the court terminates dependency jurisdiction under section 362.4 and transfers jurisdiction to family law court are referred to as "family law" or "exit" orders. (See *In re Chantal S.* (1996) 13 Cal.4th 196, 202; *In re John W.* (1996) 41 Cal.App.4th 961, 970.) "Such orders become part of any family court proceeding concerning the same child and will remain in effect until they are terminated or modified by the family court. [Citation.]" (*In re T.H.* (2010) 190 Cal.App.4th 1119, 1123.)

(2005) 134 Cal.App.4th 822, 828.) "We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence." (*In re James R.* (2009) 176 Cal.App.4th 129, 135.)

Here, the court found jurisdiction appropriate under section 300, subdivision (f). This provision states that a child who comes within the following description is within the jurisdiction of the juvenile court and may be adjudged a dependent child: "The child's parent or guardian caused the death of another child through abuse or neglect." The Supreme Court explained the scope of this provision in *In re Ethan C.* (2012) 54 Cal.4th 610, where an 18-month old girl was fatally injured in a traffic accident while her father was transporting her in an automobile without having secured her into a child safety seat. The juvenile court assumed jurisdiction over the father's two older children under subdivision (f). The father argued on appeal that "neglect" in subdivision (f) meant criminal negligence, and further contended that a finding of current risk of substantial harm to the surviving children was required to support a finding of jurisdiction over them. (54 Cal.4th at p. 617.) The Supreme Court disagreed, concluding that "section 300(f) allows (but does not require) the juvenile court to adjudge a child a dependent if the court finds that the want of ordinary care by the child's parent or guardian caused another child's death," and that "the juvenile court may adjudicate dependency under section 300(f) without any additional evidence or finding that the circumstances surrounding the parent's or guardian's fatal negligence indicate a present risk of harm to surviving children in the parent's or guardian's custody." (54 Cal.4th at pp. 617-618.) As the court explained: "[A] parent's or guardian's neglectful or abusive responsibility for a child fatality may inherently give rise to a serious concern for the current safety and welfare of living children under the parent's or guardian's care, and may thereby justify the juvenile court's intervention on their behalf without the need for separate evidence or findings about the current risk of

such harm." (*Id*. at p. 638, italics omitted.) "[I]t is '"[t]he enormity of a *death*"' of a child arising from parental inadequacy that invokes the provisions of section[] 300," and "[t]he Legislature has clearly provided that when one's abuse or neglect has had this tragic consequence, there is a proper basis for a finding that his or her surviving child may be made a dependent of the juvenile court . . . ." (54 Cal.4th at p. 634.)

Father contends he fell asleep briefly while sitting up and holding the baby, and that these actions cannot constitute neglect under any definition. This version of events appeared only in a hospital report attached to the caseworker's reports. Father refused to be interviewed by the caseworker or law enforcement personnel and did not testify at any hearing. The court was not required to unreservedly credit his off-the-record statements. The evidence also established the Father was home alone with Jo after a long day at work and that he "routinely" napped with the baby. The autopsy report and Dr. Berkowitz's testimony supported a finding that the baby died of positional asphyxiation, in other words, that something -- Father's body or the bedding -- obstructed her ability to breathe while she slept. Case law supports that co-sleeping or bed sharing with an infant leading to asphyxiation can constitute neglect, particularly where, as here, the infant was fragile due to having been born prematurely, and medical personnel had advised the parents to put the infant to sleep in a safe position. (*In re Ashley B*. (2011) 202 Cal.App.4th 968, 982; see also *In re A.M*. (2010) 187 Cal.App.4th 1380, 1385, 1388 [jurisdiction under subdivision (f) of section 300 upheld where baby sleeping with parents and older sibling was pushed into a position where he struggled to breathe, and father did not intervene to place him on his back].) Father did not deny that he was sleeping with Jo at the time of her death, nor that he routinely did so. As a nurse himself, Father should have been aware of the dangers of falling asleep with an infant and subjecting her to the possibility of positional

asphyxiation. The court's finding that jurisdiction was appropriate under subdivision (f) was supported by substantial evidence.[10]

B. *Disposition*

Father contends there was insufficient evidence that Jon was at substantial risk of serious physical injury to support the order requiring future visitation to be monitored. (See § 361, subd. (c)(1) ["A dependent child may not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . [¶] . . . [that] [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody."].) Father contends any such finding was foreclosed by the court's decision to dismiss all bases of jurisdiction

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[10] Father contends that the court improperly relied on a section 355.1, subdivision (a) presumption to sustain the section 300 subdivision (f) count. Section 355.1, subdivision (a) provides that where the court finds, based on "competent professional evidence," that injuries sustained by a minor are "of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent," that finding constitutes "prima facie evidence that the minor is a person described by subdivision (a), (b) or (d) . . . ." Father contends the presumption cannot be used to support a finding under subdivision (f). We need not resolve this issue as the court independently found that Father was negligent in co-sleeping with Jo. Moreover, the court could properly presume, due to the presence of multiple unexplained healing rib fractures, that Jo had been subjected to physical abuse before her death. Such finding supported its conclusion that the neglectful conduct that led to Jo's death warranted assertion of jurisdiction over Jon under subdivision (f). (Cf. *In re Ethan C.*, *supra*, 54 Cal.4th at pp. 619-620 [DCFS urged juvenile court to assert jurisdiction after father's failure to place toddler in child safety seat caused her death, where children's mother suffered severe psychological issues and father was living with children in overcrowded and unsanitary home].)

other than subdivision (f) of section 300, and to delete from its subdivision (f) finding the allegation that the described actions "endanger[ed] [Jon's] physical health, safety and well-being, placing [Jon] at risk of physical harm, damage and danger."

Initially we note that in light of the court's finding that Jo suffered multiple broken ribs before her death which would not have occurred except as the result of deliberate acts by one of her parents, there was evidence to support that Jon was at risk in Father and Maryann's household. We need not resolve this issue, however, because Father forfeited it. After a finding that grounds exist to support assertion of jurisdiction but that detention from the custodial parent is not required, a juvenile court has discretion under section 364 to provide reunification services to either or both parents -- or it may "bypass the provision of services and terminate jurisdiction." (*In re Gabriel L.* (2009) 172 Cal.App.4th 644, 650-651.) Father joined in DCFS's request to terminate jurisdiction.[11] When asked what Father desired to have included in the exit or family law order, his counsel stated "joint legal custody" and "monitored visit[ation] . . . as often as can be arranged." The court included those requests in its final order before transferring the matter to family court. Having obtained an order that comported with his counsel's requests at the dispositional hearing, he cannot now be heard to complain about its contents. (See *In re Kevin S.* (1996) 41 Cal.App.4th 882, 885-886 [appellant waived right to assert error on appeal concerning juvenile court's issuance of order setting section 366.26 hearing by not properly raising issue below].)

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[11] Father states in his reply brief that he reasonably "preferred termination of jurisdiction over continued supervision by DCFS and the court" because "[Jon] was placed with [Mother], who had no concerns about [Father]."

DISPOSITION

The jurisdictional and dispositional orders are affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.